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No. 83-229

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT O. WIMMER, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether due process requires full participation by counsel in a hearing conducted by the United States Naval Academy to investigate alleged possession of marijuana by a midshipman, held while a state criminal proceeding involving the same drug offense is pending.

2. Whether 10 U.S.C. 6959 authorizes the Secretary of the Navy to order to active service in an enlisted capacity a midshipman discharged from the Naval Academy on grounds of misconduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 705 F.2d 1402. The oral opinion of the district court on petitioner's motion for a preliminary injunction (Pet. App. 25a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 54a) was entered on April 28, 1983. The petition for a writ of certiorari was filed as of July 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

10 U.S.C. 6959 and 6962 are reproduced at Pet. 2-4.

STATEMENT

1. Petitioner enrolled as a midshipman at the United States Naval Academy in 1978 and was scheduled to graduate and receive a commission as a naval officer in June 1982. In August 1979, petitioner signed a form entitled "Statement and Acknowledgment of the Anti-Drug Abuse Policy of the U.S. Naval Academy" (C.A. App. 221). In executing the Statement, petitioner acknowledged that he had been "fully informed that the U.S. Naval Academy will not tolerate any drug abuse" and that illicit drug involvement, including use or possession of marijuana, violated military regulations and Maryland state law and normally would result in separation from the Academy; he also agreed that he would abide by the described anti-drug abuse policy of the Academy.

On December 13, 1981, petitioner was arrested by the Annapolis, Maryland, police for possession of marijuana. Trial on the criminal charges was set for March 19, 1982. Local authorities informed the Naval Academy that petitioner had been arrested and charged with unlawful possession of a controlled dangerous substance. Thereafter, petitioner was interviewed by a Naval Investigative Service ("NIS") special agent and admitted to marijuana use and possession.[1] Pet. App. 4a-5a, 10a, 26a.

On December 18, 1981, the Naval Academy notified petitioner that it was referring him for an investigative hearing — the initial stage of the Academy's disciplinary process — to consider whether he had violated the Academy's prohibition on possession or use of marijuana (C.A. App. 35-37). The notice alleged three separate violations of the Academy's disciplinary code (including, inter alia, the

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[1] At the time of the interview, petitioner was told that he had the right to remain silent. However, he executed a formal waiver of rights. Pet. App. 11a-12a n.5.

possession of marijuana at issue in the state criminal proceedings) and advised petitioner that "[a] finding of guilt * * * could result in a recommendation that you be administratively separated from the Naval Academy because of your misconduct" (*id.* at 35). Petitioner was provided with copies of all documents underlying the allegations against him and advised of the rights that would be afforded him at the investigative hearing, including the right to present evidence and examine witnesses (*id.* at 35-36).

The investigative hearing was held on January 13, 1982. The investigating officer's role was impartially to "determine whether or not each offense is substantiated by the evidence" (C.A. App. 48). The hearing was noncriminal and nonadversarial in nature; there was no prosecutor, and formal evidentiary rules were not followed. Because state criminal charges were pending in connection with one of the incidents being investigated, the Commandant of Midshipmen departed from the Academy's normal practice and permitted petitioner to be accompanied by counsel at the hearing (*id.* at 48-49). However, the Commandant limited the role of petitioner's attorneys at the hearing:

> Counsel will be present in a limited role at the Investigative Hearing. The purpose of counsel's presence at the Investigative Hearing is only to safeguard the midshipman's rights at the criminal proceedings, not to affect the outcome of the disciplinary hearing. Counsel's principal functions will be to advise the midshipman whether he should answer questions, what he should not say so as to safeguard himself from self-incrimination; and to observe the proceedings first-hand, so as to be better prepared to deal with attempts to introduce evidence from the hearing in later criminal proceedings. To fulfill these functions, counsel needs to speak to no one but the midshipman. Counsel

> should, however, be available to consult with the midshipman at all stages of the hearing, especially while the midshipman is being questioned.

Ibid. Both civilian and military counsel accompanied petitioner at the hearing (*id.* at 55-56). The investigating officer rejected petitioner's objections to the limitations the Commandant had placed on counsel's role and denied petitioner's request to delay the investigative hearing pending completion of the state criminal proceedings (*ibid.*). Petitioner was afforded the rights selectively to testify or remain silent and to have no adverse inferences drawn from his silence (Pet. App. 5a, 17a).

The investigating officer heard the testimony of several witnesses, including the arresting municipal police officer who had discovered marijuana in petitioner's vehicle, an NIS special agent who had conducted tests that confirmed that the substance seized from petitioner at the time of his arrest was marijuana, and the NIS special agent to whom petitioner had admitted his purchase of an ounce of marijuana (C.A. App. 56-57).[2] On the basis of the evidence presented, the investigating officer found that petitioner had possessed and used marijuana in violation of Naval Academy regulations (*id.* at 59), and the officer's written report to that effect was forwarded to the Commandant for consideration.

Petitioner was given the opportunity to submit additional evidence to the Commandant, but he declined to do so (Pet. App. 6a, 15a n.6). At the hearing before the

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[2]Petitioner contended that his confession had been procured by promises of leniency. The investigating officer found no basis for believing that the confession was improperly induced and concluded that "[e]ven if the confession had not been obtained, the Respondent's guilt of the offense of possession of marijuana would have been clearly established by testimony of the Annapolis police officer and the NIS drug analysis" (C.A. App. 60).

Commandant, petitioner again was permitted the limited assistance of counsel (C.A. App. 99). The Commandant considered the evidence and issues raised at the investigative hearing and a Naval Academy performance summary prepared by petitioner's Company Officer (*id.* at 91-94, 97-98). The Commandant found that petitioner had committed the specified violations. On the basis of the Academy's "zero tolerance for the use of marijuana" (Pet. App. 33a) and petitioner's otherwise nonexemplary performance record, the Commandant recommended to the Secretary of the Navy that petitioner be discharged from the Naval Academy and transferred to the Naval Reserve for three years' active duty in enlisted status, pursuant to 10 U.S.C. 6959. The Superintendent of the Academy joined in this recommendation. C.A. App. 116-120. The Superintendent invited petitioner to resign in lieu of discharge (*id.* at 113), but petitioner declined to do so. On January 29, 1982, the discharge recommendation was forwarded to the Secretary of the Navy, and on April 12, 1982, the Secretary discharged petitioner from the Academy and ordered him transferred to the Naval Reserve (*id.* at 133). Meanwhile, in March 1982 petitioner was acquitted of the state criminal charges.[3]

2. Petitioner brought this action in the United States District Court for the District of Maryland on April 15, 1982, seeking to enjoin the Secretary of the Navy and the Superintendent of the Naval Academy from discharging him from the Academy or assigning him to further military duty (C.A. App. 8). The district court ruled orally (Pet. App. 25a-51a) that the restrictions placed on the participation of petitioner's attorneys in the investigative hearing and the Academy's refusal to delay its proceedings until the

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[3]Petitioner's acquittal resulted from the prosecution's failure to have one of its exhibits ready and the state court's refusal to postpone the trial (Pet. App. 16a n.7).

state criminal charges were adjudicated combined to deny petitioner due process of law. The district court preliminarily enjoined the Academy from discharging petitioner and ordering him to active duty until a further hearing, consistent with the court's opinion, could be conducted. At the same time, the district court found no merit to petitioner's contention that the Navy lacked authority to order him to active duty in enlisted status if his discharge from the Academy were sustained following the new hearing (Pet. App. 48a-49a).

3. The government appealed the district court's constitutional ruling. Petitioner cross-appealed, contending that 10 U.S.C. 6959 did not authorize the Secretary to order him to active duty if he were discharged from the Academy. The court of appeals decided both issues in the government's favor (Pet. App. 1a-24a).

a. The court of appeals concluded that the Academy's proceedings comported with due process requirements. It cited this Court's instruction that "due process is flexible and calls for such procedural protections as the particular situation demands" (Pet. App. 7a, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The court of appeals noted that petitioner had been given "full notice" of the charges against him, that the investigative hearing "was non-criminal, and was conducted in a non-adversarial manner," with no opposing counsel, and that petitioner had been given the opportunity to present evidence and examine witnesses with the guidance of counsel (Pet. App. 8a-9a). In view of these factors, the presumed intelligence of those selected as midshipmen, and the Academy's interest in maintaining a relatively informal procedure, the court of appeals concluded that due process requirements had been satisfied (*id.* at 7a-9a).

The court of appeals rejected petitioner's contention that the Academy's refusal to allow counsel to conduct examination or to postpone its own disciplinary process until the resolution of the state criminal charges amounted to a constitutional violation. The court noted that petitioner had been afforded the right selectively to remain silent and the right to consult with counsel throughout the administrative hearing process (Pet. App. 5a, 9a, 19a). The court also held that, even if the Academy had violated petitioner's constitutional rights in denying his counsel full participation in the hearing, the error was "harmless" under the circumstances, since petitioner ultimately was found not guilty of the state criminal charges, and since petitioner had failed to demonstrate that participation by counsel would have resulted in any material differences in the hearing (*id.* at 10a-16a).

b. The court of appeals affirmed the district court's conclusion that 10 U.S.C. 6959 authorized the Secretary of the Navy to order petitioner to three years of enlisted duty in the active reserves following his discharge from the Naval Academy (Pet. App. 19a-24a). Section 6959 provides in pertinent part:

> (a) Each midshipman * * * shall sign an agreement that, unless sooner separated, he will —
>
> (1) complete the course of instruction at the Naval Academy;
>
> * * * * *
>
> (b) A midshipman who does not fulfill his agreement under subsection (a) may be transferred by the Secretary of the Navy to the Naval Reserve or the Marine Corps Reserve in an appropriate enlisted grade or rating, and * * * may be ordered to active duty to serve in that grade or rating for such period of time as the Secretary prescribes but not for more than four years.

The court of appeals agreed with the Secretary that the condition "unless sooner separated" in Section 6959(a) refers to separations from the Navy, rather than to separations only from the Naval Academy, and does not prohibit the transfer and activation of midshipmen who are merely separated from the Academy. The court noted that "[i]t would be a great waste for the government to lose its investment in training what proved to be unsatisfactory midshipmen if it could not put them in a lesser spot which they were capable of filling" (Pet. App. 22a). The court recognized that the Third Circuit had recently construed the statute not to authorize such action in the case of a midshipman who had been discharged from the Academy for disciplinary reasons. *Dougherty* v. *Lehman*, 688 F.2d 158 (1982). The court of appeals nonetheless concluded that the Secretary's interpretation of the phrase "unless sooner separated" in Section 6959(a), embodied in longstanding administrative regulations, was the more logical one and certainly was not plainly erroneous or inconsistent with the statute (Pet. App. 22a-24a).

ARGUMENT

The Naval Academy afforded petitioner procedural safeguards equal to or greater than those that courts have approved for student disciplinary proceedings held by civilian learning institutions. Petitioner's contention that even greater protections were constitutionally required for the investigative hearing in his case is without merit. In addition, the court of appeals' conclusion that 10 U.S.C. 6959 authorizes the Secretary to transfer to the active reserves a midshipman discharged from the Academy on disciplinary grounds is clearly correct. Although the Third Circuit has adopted a conflicting interpretation, the conflict is not of sufficient importance to warrant this Court's attention at this time.

1. Petitioner contends (Pet. 6-9) that he was denied procedural due process because the Naval Academy did not permit his counsel (as opposed to petitioner himself) to present and cross-examine witnesses during the investigative hearing.[4] But due process does not invariably require that all the formal procedures of a trial be afforded to participants in an administrative hearing. Rather, the Court has required only

> that "a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it." * * * All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," * * * to insure that they are given a meaningful opportunity to present their case.

Mathews v. *Eldridge*, 424 U.S. 319, 348-349 (1976) (citations omitted). The hearing in this case was noncriminal and nonadversarial in nature, and petitioner was not pitted against an "opposing counsel." Petitioner, a fourth year student possessing the level of intellect and judgment necessary to gain admission to the Naval Academy, was afforded a full opportunity to review all of the charges against him in advance of the hearing, to present evidence through witnesses and his own testimony, to cross-examine witnesses, to invoke the right to keep silent on a selective basis, and to consult with counsel about his statements, questions and tactics before, during and after the hearing. These procedures were clearly sufficient to satisfy the demands of due process under the circumstances. See *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974).

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[4]In the courts below petitioner also challenged the Naval Academy's decision not to postpone its own disciplinary process pending the conclusion of the state criminal proceeding. See Pet. App. 16a-19a. However, he does not raise that claim at this stage.

A number of courts have recognized that it would be inappropriate to impose elaborate procedural requirements — including the right to be represented by counsel — in connection with disciplinary proceedings at civilian learning institutions. See, *e.g.*, *Sohmer* v. *Kinnard*, 535 F. Supp. 50, 54 (D. Md. 1982); *Garshman* v. *Pennsylvania State University*, 395 F. Supp. 912, 920-921 (M.D. Pa. 1975); *Haynes* v. *Dallas County Junior College District*, 386 F. Supp. 208, 211-212 (N.D. Tex. 1974); *Barker* v. *Hardway*, 283 F. Supp. 228, 237-238 (S.D. W. Va.), aff'd, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969). Cf. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 158-159 (5th Cir.), cert. denied, 368 U.S. 930 (1961). It would be even less appropriate to impose such adversary procedures on student disciplinary proceedings at military academies in view of the special considerations applicable to military training and discipline. See *Middendorf* v. *Henry*, 425 U.S. 25, 38 (1976) (fact that a proceeding occurs within the military community is significant and is entitled to controlling weight in determining whether a Sixth Amendment right to counsel exists); *Parker* v. *Levy*, 417 U.S. 733, 749-752 (1974); *Love* v. *Hidalgo*, 508 F. Supp. 177, 183 (D. Md. 1981). Accordingly, the courts uniformly have agreed that due process does not require that those facing expulsion from service academies or military training programs be represented by counsel in disciplinary proceedings, even on a limited basis. See *Rustad* v. *United States Air Force*, No. 82-1567 (10th Cir. Sept. 28, 1983) (disenrollment from Air Force Academy); *Andrews* v. *Knowlton*, 509 F.2d 898, 904-907 (2d Cir.), cert. denied, 423 U.S. 873 (1975) (expulsion from West Point); *Hagopian* v. *Knowlton*, 470 F.2d 201, 211-212 (2d Cir. 1972) (same); *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (dismissal from Merchant Marine Academy); *Kolesa* v. *Lehman*, 534 F. Supp. 590, 593-594 (N.D.N.Y. 1982) (disenrollment from Naval ROTC); *Hickey* v. *Commandant of Fourth Naval District*,

461 F. Supp. 1085, 1096-1097 (E.D. Pa. 1978), aff'd mem., 612 F.2d 572 (3d Cir. 1979) (same). See also *Middendorf* v. *Henry*, 425 U.S. at 42-48 (given the special needs of military discipline, due process does not require that an enlisted member of the Marine Corps be represented by counsel at a summary court-martial proceeding).

The fact that petitioner was facing a state criminal charge at the time the Naval Academy held its investigative hearing does not mandate a different result in this case. See *Rustad* v. *United States Air Force*, *supra*. See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976). The Academy departed from its usual rule of prohibiting representation by counsel at such hearings in order to accommodate the special circumstances presented by petitioner's case. See page 3, *supra*; Pet. App. 5a. By permitting petitioner to confer with counsel before he offered testimony, and by allowing petitioner to testify selectively without having any negative inference drawn from his silence, the Academy did more than was necessary to protect petitioner's collateral interests in connection with the state proceeding. The First Circuit has suggested that due process would be satisfied by permitting such limited assistance of counsel in an academic disciplinary hearing at a *civilian* institution in the case of a student facing state rape and assault charges. *Gabrilowitz* v. *Newman*, 582 F.2d 100, 105-107 (1978). See also *Nzuve* v. *Castleton State College*, 133 Vt. 225, 335 A.2d 321 (1975). In fact, petitioner was given more rights than the university student in *Gabrilowitz*, who apparently did not have the option of testifying or remaining silent on a selective basis. Petitioner fails to cite any authority for the proposition that the pendency of related criminal charges entitled him to unlimited representation by counsel in an investigative hearing within the academic disciplinary process.[5]

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[5]Petitioner also notes (Pet. 7) that the Navy could have instituted court martial proceedings against him based on his possession of marijuana. It is true that virtually any violation of Academy regulations

In addition, petitioner does not specify what particular advantage he would have derived from such unlimited representation in this case. The court of appeals was correct in its alternative conclusion that, assuming arguendo there was a due process violation, in the circumstances of this case "the deprivation of examining counsel was harmless error as a matter of law" (Pet. App. 16a). The court of appeals carefully examined the record — which included an abundance of uncontradicted evidence that petitioner had violated the Academy's regulations — and concluded that additional participation by petitioner's attorneys would not have affected the outcome of the investigative hearing (*id.* at 13a-15a). Moreover, as the court of appeals noted (*id.* at 16a), petitioner could not have been prejudiced in his defense of the state criminal charges, since those charges ultimately were dismissed at trial on unrelated grounds.[6] Indeed, to the extent petitioner's due process claim rests on the pendency of criminal proceedings against him, his claim is moot, since he is no longer facing criminal charges in connection with the conduct that was the subject of the investigative hearing. Petitioner's due process claim clearly does not warrant this Court's attention.

2. Petitioner also seeks review of the court of appeals' determination (Pet. App. 19a-24a) that 10 U.S.C. 6959 empowers the Secretary to transfer to active duty a midshipman who is discharged from the Naval Academy on

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could result in a court martial. However, this happens only rarely, and there were no court martial proceedings in petitioner's case. In any event, the possibility of court martial proceedings would not entitle an individual to unlimited representation of counsel in the Academy's disciplinary process any more than would the pendency of state criminal charges.

[6]See page 5 note 3, *supra*.

disciplinary grounds.[7] Review of that issue is unwarranted because the court below correctly construed the statute.

Under 10 U.S.C. 6959(a), a midshipman must agree in writing that "unless sooner separated" he will complete his course of instruction at the Naval Academy and accept a commission as an officer; under Section 6959(b), a midshipman "may be transferred by the Secretary of the Navy" to serve for a period of up to four years of active duty in an enlisted status if he "does not fulfill his agreement under subsection (a)."[8] Relying principally on the Third Circuit's decision in *Dougherty* v. *Lehman*, 688 F.2d 158 (1982), petitioner contends that a midshipman who is discharged for disciplinary reasons prior to graduation has been "sooner separated" within the meaning of Section 6959(a) and thus is not subject to the transfer and activation provisions of Section 6959(b). The court below correctly concluded that the phrase "unless sooner separated" refers to separations from the Navy, not from the Naval Academy. Midshipmen who have been separated only from the Academy — for disciplinary or other reasons — accordingly may be transferred to active duty in the Navy or Marine Corps Reserve in the Secretary's discretion pursuant to Section 6959(b). Accord, *Green* v. *Lehman*, 544 F. Supp. 260, 263-264 (D. Md. 1982), appeal docketed, No. 83-1521 (4th Cir.).

The court of appeals' interpretation is supported by examination of the context of 10 U.S.C. 6959 and 6962 and by consideration of the purpose of the statute. A midshipman entering the Naval Academy simultaneously assumes an obligation to the Academy and an obligation to serve six

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[7]See page 7, *supra*, for the relevant portions of the text of Section 6959.

[8]Parallel statutory provisions govern the obligations of persons entering West Point and the Air Force Academy. See 10 U.S.C. 4348 and 9348.

years in the Navy. See 10 U.S.C. 651 and 6959; S. Rep. 1514, 88th Cong., 2d Sess. 4 (1964). Section 6962 explicitly authorizes the Secretary, in his discretion, to order that a midshipman who lacks the requisite aptitude or is guilty of a disciplinary infraction be discharged from the Naval Academy, from the United States Navy, or from both (see Pet. App. 20a-21a). Likewise, the term "separated" in Section 6959(a) (which refers back to sanctions invoked by the Secretary pursuant to Section 6962) could refer to a separation either from the Naval Academy or from the Navy (or from both). The court of appeals reasonably concluded that a midshipman who is discharged for violating the disciplinary rules of the Academy has thereby failed to "complete the course of instruction" (10 U.S.C. 6959(a)(1)) and is accordingly subject to transfer to enlisted duty *unless* he is *also* discharged (*i.e.*, "separated") from the Navy.

Although this construction may not be the only possible reading of the phrase "unless sooner separated," it is the one that logically effectuates the purpose of the statute. As the court of appeals noted (Pet. App. 22a), a different construction would result in considerable waste, since the government would lose its investment in training a midshipman in cases like this one. Moreover, the court of appeals' construction is consistent with the legislative history. Congress enacted Section 6959(b), authorizing the Secretary to order a midshipman to enlisted service, in order to close a loophole that previously allowed an individual who failed to complete the course of instruction to avoid his military service obligation altogether. See S. Rep. 1514, *supra*, at 4. Congress was particularly troubled by the fact that individuals who avoided their military service obligations by failing to qualify for a commission had received valuable educational subsidies without providing the government with a quid pro quo. See *ROTC Vitalization Act of 1964: Hearing on H. R. 9124 Before the Senate Comm. on Armed Services,*

88th Cong., 2d Sess. 39-40 (1964) (remarks of Sen. Thurmond); *Reserve Officers' Training Corps Program: Hearings Before Subcomm. No. 3 of the House Comm. on Armed Services*, 88th Cong., 1st Sess., No. 33, 6532-6534, 6599, 6602, 6629, 6715, 6836, 6849-6850 (1963). The decision below comports with congressional intent by construing the statute to provide that midshipmen may be required to fulfill their service obligations in an enlisted capacity if they fail to qualify for their officer's commission because they breached the Academy's disciplinary code.[9]

The court of appeals' decision also construes the phrase "unless sooner separated" consistently with interpretative regulations promulgated by the Department of Defense and the Navy. See DOD Directive No. 1332.23 para. V.A.2; Naval Personnel Manual art. 3850400, paras. 2, 3, 6.b(4) (C.A. App. 230-231). Since these agencies are charged with administering the statutory provisions at issue, their construction of those provisions is entitled to considerable deference. *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 667-668 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Third Circuit's contrary decision in *Dougherty* v. *Lehman*, *supra*, is untenable and seems unlikely to be followed by other circuits. The *Dougherty* court construed the phrase "unless sooner separated" as excusing from the transfer provision of Section 6959(b) a midshipman who, like petitioner, was involuntarily separated from the Naval

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[9]The decision below also results in similarity of treatment of students enrolled in Reserve Officer Training Corps ("ROTC") programs at state and private educational institutions and their fellow officers-in-training at the service academies. 10 U.S.C. 2105, the ROTC counterpart to Section 6959(b), has been construed to authorize the Secretaries of the military departments to order a college student involuntarily discharged from the ROTC program to active duty status upon graduation from college. *Hickey* v. *Commandant*, 461 F. Supp. at 1094-1095. See also 10 U.S.C. 2107(f).

Academy for disciplinary reasons. At the same time, however, the *Dougherty* court recognized that Congress, in enacting 10 U.S.C. 6959(b), specifically intended to subject to enlisted duty those midshipmen who were involuntarily discharged from the Naval Academy for violating the Academy's rule against marrying prior to graduation. 688 F.2d at 163-164. Faced with this inconsistency, the Third Circuit (on the basis of what the court below characterized as "less than conclusive" legislative history, Pet. App. 23a) construed Section 6959(b) to permit the transfer and activation of a midshipman who "violates the rules [of the Academy] with the purpose of provoking a discharge," but not to permit such action in the case of a midshipman who violates the Academy's rules without the intent of being discharged. The Third Circuit's decision thus attributes to Congress a desire to tie the Secretary's transfer authority to the subjective intent of the midshipman at the time he engages in the conduct that leads to his discharge from the Academy. That unwieldy standard finds no support in the statute itself.

It is not surprising that the court below was simply "unable to follow the [*Dougherty*] court's reasoning" (Pet. App. 23a). We believe the *Dougherty* opinion is of such questionable merit that review by this Court to resolve the conflict in the circuits is unnecessary at the present time.[10] The logic of the decision below seems likely to prevail in future cases. Moreover, because the Naval Academy is physically located within the Fourth Circuit, the decision below is likely to be controlling from a practical standpoint. The Department of the Navy advises us that there have been

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[10]The Third Circuit itself, in denying a request for attorneys' fees, characterized *Dougherty* as presenting an "exceedingly close question of law" and noted that the arguments and precedents cited in the Secretary's rehearing petition in that case "make a strong case for his interpretation of the statute, regulations, and his authority." *Dougherty* v. *Lehman*, 711 F.2d 555, 566 (1983).

only a handful of judicial actions involving transfer authority under 10 U.S.C. 6959 and the parallel provisions applicable to other branches of the military. There will be future opportunities for the Court to consider this issue if other courts should adopt the *Dougherty* court's reasoning or if the issue should assume greater significance than it now appears to have.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]Moreover, the Department of Defense is in the process of preparing clarifying legislation that, if enacted by Congress, would eliminate any remaining ambiguity and would endorse the decision below. If such legislation were enacted, it would eliminate any need to resolve the conflict between this case and *Dougherty*.

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